IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. LONNIE MAURICE HILL, Defendant.	No. CR03-0081 **REPORT AND RECOMMENDATION**

This matter comes before the court pursuant to the defendant's October 1, 2003, motion to suppress evidence. The court held an evidentiary hearing on this motion on October 16, 2003, at which the defendant was present and represented by Clemens Erdahl. The government was represented by Special Assistant United States Attorney Teresa K. Baumann. It is recommended that the motion to suppress be denied.

The motion to suppress arises out of the October 27, 2002, search of a convenience store bathroom occupied by the defendant and a female friend immediately prior to the search. The defendant contends that the police did not have probable cause or reasonable suspicion to enter the bathroom. The government contends that the defendant does not have standing to object to the search, that the police had reasonable suspicion that illegal activity was afoot, and that the defendant abandoned the items that were seized from the bathroom. The court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

On October 27, 2002, Cedar Rapids Police Officer Frank Vozenilek was on routine patrol in the 4:00 p.m. to 4:00 a.m. shift. He received a call to go to the Handimart on First Avenue in Cedar Rapids as there had been a complaint from the clerk of suspected sexual activity in the bathroom. Officer Vozenilek arrived at the Handimart approximately

four minutes after he was called to that location. He contacted the clerk who indicated that a black male and a while female had entered the bathroom and would not come out. Officer Vozenilek knew the area to be one in which prostitution frequently occurs.

After making contact with the convenience store clerk, Officer Vozenilek knocked with his fist on the bathroom door. There was no response. He then knocked loudly with his flashlight. Again, there was no response. However, Officer Vozenilek heard the jingling of what he thought was a belt buckle. He then told the people inside the bathroom to come out. This direction was ignored. He used a "leatherman" tool to unlock the door to the bathroom but he did not open it. Again, he told the occupants to come out. Someone inside the bathroom locked the door again from inside. Again, Officer Vozenilek unlocked the door but did not open it. Shortly thereafter, a young woman came out of the bathroom. She opened the bathroom door just enough to get out. As the door was almost shut behind her, the man in the bathroom started to come out. It was the defendant. Officer Vozenilek could see that the defendant's zipper and button to his pants were undone but his pants were held up by a belt that was cinched.

Upon making eye contact with Officer Vozenilek, the defendant took a step back into the bathroom and appeared to be setting something down. The police officer heard a metallic sound as the object was set down. As the defendant then came out of the bathroom, Officer Vozenilek looked back in to see what the defendant had set down. He looked to the only metal object nearby and saw that baggies containing marijuana and crack cocaine were on a sanitary napkin disposal bin next to the toilet. See Government's Exhibits 1 and 2. The defendant left the bathroom and dropped a sweatshirt and jacket on the floor. Based on his observation of the marijuana and crack cocaine, Officer Vozenilek patted the defendant down and placed him under arrest. Two baggies containing crack cocaine were taken from the metal bin. Inside, 79 rocks of crack cocaine weighing 22.6 grams were recovered. Inside the defendant's sweatshirt, police found an electronic scale.

At about this time, Officer Vozenilek's commander arrived. The defendant was taken to a police car. An inventory of the defendant's pockets revealed marijuana in the defendant's left front pocket and approximately $300 in cash.

CONCLUSIONS OF LAW

Reasonable Expectation of Privacy

In order to have standing to object to a search, the defendant must have a legitimate expectation of privacy in the place to be searched that society considers reasonable. United States v. Jacobsen, 466 U.S. 109 (1984). Here, Officer Vozenilek did not attempt to open the door to the bathroom or enter it until the second occupant of this public bathroom was in the process of leaving. As the defendant was leaving a public bathroom, he had no expectation of privacy in what Officer Vozenilek could observe from the doorway as he entered that public bathroom. See generally United States v. White, 890 F.2d 1012 (8th Cir. 1989) (defendant had no expectation of privacy in a public bathroom stall where a police officer could observe illegal activity by looking through the gap between the door to the stall and the stall itself).

Unlocking the Door

The defendant contends that the officer "was wrong to unlock the door of an occupied bathroom without a warrant and without probable cause." The defendant further asserts that Officer Vozenilek violated the defendant's "right to be free from the warrantless, forced entry of police officers while using the restroom in a public place." This argument assumes that the officer's act of unlocking the door had a Fourth Amendment significance. Because the officer simply used a tool to unlock the restroom door but stopped short of opening it, the act had no Fourth Amendment significance.

The court recognizes that the defendant manifested an expectation of privacy in his and his co-occupant's activities inside the restroom by locking the door. See generally United States v. Lyons, 898 F.2d 210, 213 (1st Cir. 1990) (citing United States v. Chadwick, 433 U.S. 1, 11 (1976)). However, because the insertion of even a key into a lock reveals nothing about the occupants or goings on inside, "this course of investigation did not constitute a search." Lyons, supra, at 213.

The act of inserting a key into a lock has been the subject of disagreement as to whether such an act is a Fourth Amendment search. The Eighth Circuit Court of Appeals has not decided whether trying a key in a lock constitutes a search for purposes of the Fourth Amendment. United States v. Taylor, 119 F.3d 625, 629 (8th Cir. 1997). However, the rationale expressed by other circuits in finding that insertion of a key is a Fourth Amendment search provides a useful analysis for the instant facts. An owner of a lock may have enough privacy interest in the keyhole to make the inspection of that lock a search. Lyons, supra, at 212-13. Likewise, insertion of a key into a lock to see if it fits may constitute the beginning of a search. See United States v. Portillo-Reyes, 529 F.2d 844, 848 (9th Cir. 1975). As an occupant of a public restroom, the defendant was not the owner of the lock on the door. More significantly, the officer inserted a tool, not a key, into the door of the public restroom. Therefore, the defendant had no privacy interest in the lock and the insertion of the key did not expose the defendant's identity nor the contents of the restroom.

Moreover, even when courts have found the insertion of a key into a lock to be a Fourth Amendment search, they also have held that such a search is not unreasonable because a privacy interest in a keyhole "is so small that no probable cause is needed to inspect it." Taylor, supra, at 629 (citing Lyons, supra, at 212-213). The Fourth Amendment requires that searches be *reasonable*, and although a warrant may be an essential ingredient of reasonableness much of the time, for less intrusive searches it is not. California v. Acevedo, 500 U.S. 565 (1991). "Although the owner of a lock has a privacy

interest in a keyhole--enough to make the inspection of that lock a 'search'--the privacy interest is so small that the officers do not need probable cause to inspect it." United States v. Concepcion, 942 F.2d 1170, 1173 (7th Cir. 1991). The defendant's circumstances, being in a public restroom and having the door unlocked by a tool rather than a key, implicate even less of a privacy interest than those defendants who can claim ownership over the keyhole investigated.

Abandonment

Upon recognizing the officer, the defendant appeared to be setting something down. At the same time, Officer Vozenilek heard a metallic sound. When the defendant emerged from the restroom, Officer Vozenilek found baggies containing marijuana and crack cocaine on the only nearby metallic object, the sanitary napkin receptacle. The government contends that these items, as well as the defendant's outer clothing and the scale found amongst his outer clothing, were abandoned and thus the defendant had no expectation of privacy in them.

It is well established that the warrantless search of abandoned property does not constitute an unreasonable search and does not violate the Fourth Amendment. Abel v. United States, 362 U.S. 217, 241 (1960). This is because when individuals voluntarily abandon property, they forfeit any expectation of privacy in it that they might have had. United States v. Segars, 31 F.3d 655, 658 (8th Cir. 1994); U.S. v. Dawdy, 46 F.3d 1427, 1430 (8th Cir. 1995). Abandonment is an ultimate fact or conclusion based generally upon a combination of act and intent. Intent may be inferred from words spoken, acts done, and other objective facts, and all the relevant circumstances at the time of the alleged abandonment should be considered. United States v. Hoey, 983 F.2d 890, 892 (8th Cir. 1993).

The existence of police pursuit or investigation at the time of the abandonment does not itself render the abandonment involuntary. However, abandonment cannot be the product of unlawful police conduct. Segars, supra, at 658. Officer Vozenilek was

lawfully in a place that customers are invited to be at the time that the defendant abandoned the contraband. When the defendant left the restroom after having set the contraband down in the plain view of the officer, he abandoned the contraband and had no protectable Fourth Amendment privacy interest in it. See United States v. Hollman, 541 F.2d 196, 199 (8th Cir. 1976). The officers then lawfully seized the abandoned contraband and, having established probable cause, arrested the defendant.

Upon the foregoing,

IT IS RECOMMENDED that, unless any party files objections[1] to the Report and Recommendation in accordance with 28 U.S.C. § 636(b)(1)(C) and Fed. R. Civ. P. 72(b) within ten (10) days of the service of a copy of this report and recommendation, the motion to suppress evidence be denied.

October 17, 2003.

JOHN A. JARVEY
Magistrate Judge
UNITED STATES DISTRICT COURT

[1]Objections must specify the parts of the report and recommendation to which objections are made. Objections also must specify the parts of the record, including exhibits and transcript lines, which form the basis for such objections. See Fed. R. Civ. P. 72. Failure to file timely objections may result in waiver of the right to appeal questions of fact. See Thomas v. Arn, 474 U.S. 140, 155 (1985); Thompson v. Nix, 897 F.2d 356 (8th Cir. 1990).